Chan Chor Shuh v Public Prosecutor

COURT OF APPEAL (KUALA LUMPUR) — CRIMINAL APPEAL NO C-05-45 OF 1996

MOKHTAR SIDIN, ABDUL KADIR SULAIMAN AND PS GILL JJCA

16 JANUARY 2003

Criminal Procedure *— Defence — Court, duty of — Whether court to consider all evidence adduced in support of defence — Whether court to consider carefully whether defence put forward raised a reasonable doubt in prosecution's case — Whether court to consider defence even if not specifically raised — Whether court's lack of application of defence would occasion miscarriage of justice*

Criminal Procedure *— Witness — Material witness — Whether calling of arresting officer essential to unfolding of prosecution's case*

Evidence *— Agent provocateur — Whether informer was agent provocateur — Person more involved than mere informer — Lack of evidence to definitely suggest person an agent provocateur — Whether person should be produced or offered as a witness — Whether evidence of such person essential for the unfolding of the prosecution's case — Whether trial judge had erred in deciding person was a mere informer not needing to be called as a witness*

Evidence *— Presumption — Drug trafficking — Whether trial judge erred in invoking presumption of trafficking based on presumption of possession — Benefit of doubt to accused — Dangerous Drugs Act 1952 s 37(d)*

The appellant was convicted and sentenced to death for an offence under s 39(B) of the Dangerous Drugs Act 1952 ('the Act'). On appeal to the Court of Appeal, the court found that there were a number of infirmities in the case. Firstly, the trial judge had invoked a presumption of possession to raise a presumption of trafficking. The second infirmity concerned the trial judge's assessment of an informer's role in the unfolding of the prosecution's narrative. The evidence established the presence of an informer who was present with the arresting officer at the time of the appellant's arrest and had in fact travelled with the officer in the same car. The prosecution, relying on s 40 of the Act did not call or offer this informer as a witness. The defence submitted that this informer — a character named Wong Lou Kat ('Wong') — took on the role of an agent provocateur and should have been called or at least offered as a witness by the prosecution. The evidence of the defence was that Wong was known to the appellant, had dialogues and dealings with him concerning the hiring of a car, arranged the meeting point not far from where the appellant was arrested and was present at the time of the appellant's arrest. The third infirmity concerned the trial judge's finding that the identity of the arresting officer was immaterial. The prosecution claimed that the arresting officer was one ASP Luthfi whereas the defence claimed he was one PC Yap.

Held, allowing the appeal and setting aside the conviction:

(1) The decision in this case was given in 1996 well before the Federal Court decision of *Muhammed bin Hassan v Public Prosecutor* [1998] 2 MLJ 273, which decided in 1997 that it was wrong to rely on a presumption of possession of a dangerous drug under s 37(d) of the Act to raise a presumption of trafficking of the drug in question. In the instant case, the trial judge in hindsight was wrong in invoking the 'double presumption' test (see p 30C–D).

(2) The law requires a trial judge to consider all of the evidence that has been adduced in support of the defence. A court must consider carefully whether a defence put forward is capable of raising a reasonable doubt in the prosecution's case; *Mohamad Radhi bin Yaakob v Public Prosecutor* [1991] 3 MLJ 169 followed. In a suitable case, a court must consider a defence even if it has not been specifically raised; *R v Porrit* (1961) 45 Cr App Rep 348 followed. On the facts, the Court of Appeal could not agree with the trial judge's treatment of the defence especially in respect of the role of Wong. Even though there was a paucity of evidence of whether Wong was an agent provocateur, he should have been produced as a prosecution witness or at least offered to the defence in view of the roles that he played. Wong was present at the time of arrest. There was communication between him and the appellant prior to the appellant's arrest and he had arranged the rendezvous with the appellant. Wong was also essential to the unfolding of the narrative of the prosecution's case, and the trial judge's rejection of the need to call him based on the fact that he was an informer was misplaced (see pp 33B, E, G–H, 34C).

(3) A distinct possibility not considered by the trial judge was the fact that there could have been a pre-arrangement between the appellant and Wong about a pick-up at the rendezvous suggested by Wong. If this possibility was accepted, a different complexion would have been given to the case. The trial judge's lack of application of this possible defence occasioned a miscarriage of justice (see pp 33I–34B).

(4) It was an erroneous view to suggest that it was immaterial as who arrested the appellant. This was tantamount to riding rough shod over the evidence. It would matter who effected the arrest as it would have a bearing on the prosecution's narrative. The fact that PC Yap was not called as a witness by the prosecution but merely offered to the defence would have a material effect on the prosecution's case (see p 34G–H).

[Bahasa Malaysia summary

Perayu telah disabit dan dijatuhi hukuman mati atas kesalahan di bawah s 39B Akta Dadah Berbahaya 1952 ('Akta tersebut'). Semasa

rayuan di Mahkamah Rayuan, mahkamah tersebut mendapati terdapat banyak kelemahan di dalam kes ini. Pertama, hakim perbicaraan telah menggunakan anggapan pemilikan bagi menimbulkan anggapan mengedar. Kelemahan kedua adalah mengenai penilaian hakim terhadap peranan pemberi maklumat dalam menghuraikan naratif pendakwaan. Keterangan telah menunjukkan bahawa pemberi maklumat tersebut ada bersama-sama dengan pegawai yang menahan semasa penahanan perayu dan telah pergi bersama-sama dengan pegawai tersebut di dalam satu kereta. Pihak pendakwaan, dengan bergantung kepada s 40 Akta tersebut, tidak memanggil atau menawarkan pemberi maklumat tersebut sebagai saksi. Pihak pembelaan mengatakan bahawa pemberi maklumat tersebut — seorang yang bernama Wong Lou Kat ('Wong') — telah memainkan peranan sebagai 'agent provocateur' dan sepatutnya dipanggil atau sekurang-kurangnya ditawarkan sebagai seorang saksi oleh pihak pendakwa. Keterangan pembelaan adalah bahawa perayu mengenali Wong, telah bercakap dan berurusan dengan beliau berkenaan dengan penyewaan kereta, mengaturkan tempat pertemuan tidak jauh dari tempat perayu ditahan dan telah hadir semasa perayu ditahan. Kelemahan ketiga adalah berkenaan dengan penemuan hakim perbicaraan bahawa identiti pegawai yang menahan adalah tidak penting. Pihak pendakwaan menyatakan bahawa pegawai yang menahan adalah ASP Luthfi sementara pihak pembelaan menyatakan bahawa pegawai tersebut adalah PC Yap.

Diputuskan, membenarkan rayuan dan mengenepikan sabitan:

(1) Keputusan kes ini adalah pada tahun 1996, iaitu sebelum keputusan Mahkamah Persekutuan di dalam kes *Muhammed bin Hassan v Public Prosecutor* [1998] 2 MLJ 273 yang diputuskan pada 1997 yang mana dinyatakan bahawa ianya adalah salah untuk bergantung kepada satu anggapan pemilikan dadah berbahaya di bawah s 37(d) Akta tersebut, bagi menimbulkan anggapan mengedar dadah. Di dalam kes semasa, hakim perbicaraan salah di dalam menggunakan anggapan berganda tersebut (lihat ms 30C–D).

(2) Undang-undang memerlukan hakim perbicaraan untuk menimbangkan segala keterangan yang telah diberi di dalam pembelaan. Sesebuah mahkamah mestilah menimbangkan sama ada pembelaan yang diberi dapat menimbulkan satu keraguan yang munasabah di dalam kes pendakwaan; *Mohamad Radhi bin Yaakob v Public Prosecutor* [1991] 3 MLJ 169 diikut. Di dalam kes yang bersesuaian, sesebuah mahkamah perlu menimbangkan sesuatu pembelaan walaupun jika ia tidak ditimbulkan secara spesifik; *R v Porrit* (1961) 45 Cr App Rep 348 diikut. Pada fakta-fakta tersebut, Mahkamah Rayuan tidak boleh bersetuju dengan cara hakim perbicaraan menilai pembelaan terutamanya berkenaan dengan peranan Wong. Walaupun terdapat kekurangan keterangan sama ada Wong adalah seorang 'agent

provocateur', beliau sepatutnya dipanggil sebagai saksi pendakwa atau sekurang-kurangnya ditawarkan kepada pihak pembelaan, memandangkan peranan yang dimainkannya. Wong hadir semasa perayu ditahan. Terdapat komunikasi di antara beliau dengan perayu sebelum perayu ditahan dan beliau telah mengaturkan pertemuan dengan perayu. Wong juga adalah penting dalam menghuraikan naratif kes pendakwaan dan penolakan hakim perbicaraan mengenai perlunya Wong dipanggil berdasarkan fakta bahawa beliau adalah seorang pemberi maklumat adalah tidak patut (lihat ms 33B, E, G–H, 34C).

(3) Satu kemungkinan yang tidak dipertimbangkan oleh hakim perbicaraan adalah bahawa mungkin terdapat satu perancangan di antara perayu dengan Wong mengenai satu kutipan, di tempat pertemuan yang diaturkan oleh Wong. Jika kemungkinan ini diterima, satu gambaran yang berbeza akan diberi kepada kes ini. Kurangnya applikasi ke atas kemungkinan pembelaan tersebut oleh hakim perbicaraan telah menyebabkan satu ketidakadilan (lihat ms 33I–34B).

(4) Ia adalah satu pandangan yang salah bahawa persoalan siapa yang menahan tidak penting. Ia adalah hampir sama seperti mengenepikan keterangan. Siapa yang membuat penahanan tersebut adalah penting kerana ianya mempunyai kaitan kepada naratif pendakwaan. PC Yap yang tidak dipanggil sebagai saksi oleh pihak pendakwaan tetapi ditawarkan kepada pihak pembelaan, mempunyai kesan yang penting terhadap kes pendakwaan (lihat ms 34G–H).

Notes

For cases on the duty of court, see 5 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 1446–1457.

For cases on witnesses, see 5 *Mallal's Digest* (4th Ed, 2001 Reissue), paras 4333–4335.

For cases on whether an informer was an agent provocateur, see 7 *Mallal's Digest* (4th Ed, 2001 Reissue), para 244.

For cases on the presumption of drug trafficking, see 7 *Mallal's Digest* (4th Ed, 2001 Reissue), paras 1840–1843.

Cases referred to

Mohamad Radhi bin Yaakob v PP [1991] 3 MLJ 169 (folld)
Muhammed bin Hassan v PP [1998] 2 MLJ 273 (refd)
Ong Ah Too v Regina [1955] MLJ 247 (refd)
R v Porrit (1961) 45 Cr App Rep 348, [1961] 3 All ER 463 (folld)

Legislation referred to

Courts of the Judicature Act 1964 s 60
Dangerous Drugs Act 1952 ss 37(d), 39B, (1)(a), (2), 40

Appeal from: Criminal Trial No 47–1–95 (High Court, Kuantan)

Karpal Singh (*Gobind Deo Singh* with him) (*Karpal Singh & Co*) for the appellant.

Kamarul Hisham bin Kamaruddin (Attorney-General's Chambers) for the respondent.

PS Gill JCA (delivering judgment of the court): The appellant, Chan Chor Shuh, was charged with an offence of trafficking a total of 36.72g in weight of heroin and monoacetylmorphine on 7 January 1994 in contravention of s 39B(1)(a) punishable under s 39B(2) of the Dangerous Drugs Act 1952 ('the Act'). The High Court at Kuantan convicted him and sentenced him to death. We allowed the appeal and quashed the conviction. We now give our reasons.

The decision in this case was given in 1996 well before the Federal Court case *Muhammed bin Hassan v Public Prosecutor* [1998] 2 MLJ 273, which decided in 1997 that it was wrong to rely on a presumption of possession of a dangerous drug under s 37(d) of the Act, to raise a presumption of trafficking, of the drug in question. In the instant case the learned trial judge in hindsight was wrong in invoking a 'double presumption' test.

The other grave infirmity in the judgment was the learned trial judge's treatment of the defence case, especially in the context of the role of the informer in the unfolding of the prosecution narrative.

The facts showed that acting on information, a party of police personnel led by ASP Mohd Luthfi Ismail bin Abdullah ('SP5'), and seven others proceeded to a road junction between Sg Lembing and Paramount Garden. The informer was also a member of the party and travelled in ASP Luthfi's car.

On arrival at Jalan Paramount, the said informer pointed to a car that was parked on the left hand side of Jalan Paramount facing towards Sg Lembing, ASP Luthfi immediately stopped his car in front of the said car, got down, and walked towards the car. On reaching the car he proceeded to open the door of the car, and found that the engine of the car was still on. ASP Luthfi introduced himself to the driver of the car, who was incidentally the appellant. He then turned off the engine of the car. The appellant was seated at that point of time at the driver's seat of the car. ASP Luthfi then noted a red plastic package, on the passenger's seat of the car next to the appellant, and proceeded to remove it. The appellant was brought out of the car with some resistance.

On examining the package, ASP Luthfi noticed that there was a further white package wrapped within it, and the white package contained powdery substance which was suspected to be heroin. After seizing this package, and detaining the appellant, he returned to the police station. The powdery substance was sent to the chemist for chemical analysis, and it was found to be heroin weighing 6.51g and monoacetylmorphin weighing 30.21g.

A It was also discovered that the said car registration no CAD 3199, driven by the appellant at the material time was actually a hired car. The hirer, one En Mohd Noor, had in his evidence stated that the appellant had hired the said car for a period of two days on 5 January 1994. However. the car was not returned, and on the 8 January 1994, En Mohd Noor received a telephone call from the appellant informing him that he wanted to extend B the period of time for another day. On 9 January 1994, En Mohd Noor received information that the said car was detained in Kuantan. He categorically denied that there was any package left in the car at the time the appellant hired the said car.

In the course of the trial, and the appeal, the main plank of argument of C the defence was the role played by the informer in the said raid carried out by the police leading to the arrest of the appellant, and whether the protection of s 40 of the Act should have been accorded to him. We shall deal with the issue presently.

D *Informer or agent provocateur?*

From the evidence garnered at the trial, we find there was a visible presence of an informer, who according to the arresting officer was with him at the time of the arrest, and travelled in the same car as the arresting officer when the arrest was made. However, the prosecution neither called, nor made the said informer available, having relied on s 40 of the Act. It was the argument E of the prosecution, that since the informer had not played a role in the transaction it did not deprive him of the protection afforded by s 40 of the Act. We wish to interject here to say that it is an established fact that no transaction took place in the factual matrix of this case. The defence, however, contended that the informer was an agent provocateur, and was F someone that the appellant knew as Wong Lou Kat, and in fact had, according to the defence, brought the appellant to Kemaman, Terengganu, to hire the said car. At the material time, on the night in question of the appellant's arrest, the appellant had arranged to meet with the said Wong Lou Kat in order to return the hired car. They had planned to meet by a road near a temple, and Wong Lou Kat had promised to be there in G 15 minutes.

On arrival at the said rendezvous, the appellant had seen the said Wong Lou Kat arrive in a car. The appellant tried to signal to him to stop instead Wong Lou Kat turned into a side road. The appellant followed after him, overtook him, and pulled up in front of him. He then approached Wong H Lou Kat's car, and on opening the door of the car, was detained by Yap, a police personnel. The appellant stated that ASP Luthfi was not anywhere in sight, and arrived later. The appellant stated that the police personnel combed the area, and chanced upon a package near the temple that he was not aware of.

From the submissions in the trial court, and before us, it is evident that I the defence was of the view that the said Wong Lou Kat took on a role of more than an informer, and was integral to the prosecution case, as he was known to the appellant, and in fact had undisputed dealings with the

appellant in respect of the hiring of the said car and subsequently the rendezvous, which was when the arrest took place. A

It was the submission of the defence before us, and the court below, that the prosecution was thus obliged to produce Wong Lou Kat as a witness of the narrative, or at the very least, to offer him to the defence. Since neither course was adopted, the defence contended that an adverse inference should be drawn against the prosecution. B

The trial judge did not accede to this course of submission of the defence, and had this to say about it in his grounds of judgment:

> Jika diperhatikan, ujian yang dinyatakan di dalam kes itu ialah sama ada kegagalan pendakwa memanggil seseorang saksi itu boleh menyebabkan terdapatnya kelompangan di dalam kes pendakwa dan dengan itu pihak pendakwa dikatakan gagal membuktikan kesnya tanpa keraguan yang munasabah. Dalam hubungan ini, perlu dinyatakan bahawa setiap kes bergantung kepada faktanya sendiri. Berbalik kepada kes kita ini, bolehkah dikatakan terdapat kelompangan sedemikian tanpa kehadiran apa yang dirujuk sebagai 'sumber' untuk memberi keterangan bagi pihak pendakwa atau disediakan untuk disoal balas oleh pihak pendakwa? Saya berpendapat, untuk memutuskan persoalan ini kita perlu mengambil kira fakta yang terdapat dalam kes ini dan melihat sejauh manakah peranan yang dimainkan oleh 'sumber' di dalam membawa kepada tertangkapnya tertuduh. Apa yang dapat dilihat di dalam kes ini adalah 'sumber' ialah orang yang telah membawa pasukan polis ke tempat di mana kereta tertuduh dengan tertuduh di dalamnya telah dijumpai. Selain itu kereta 'sumber' telah digunakan oleh pihak polis di dalam operasi yang telah dijalankan. Tidak ada keterangan yang menunjukkan bahawa 'sumber' telah bertanggungjawab menyebabkan atau menarik (entice) tertuduh untuk melakukan kesalahan itu. Lagipun di dalam keadaan kes ini tidak ada keterangan yang menunjukkan bahawa 'sumber' telah bertukar menjadi ejen provokatur dan dengan itu menyebabkan dia hilang perlindungan yang diberikan kepadanya di bawah s 40 Akta [Akta Dadah Berbahaya 1952]. Juga tidak ada keterangan yang menunjukkan bahawa 'sumber' yang telah meminta tertuduh membawa dadah itu ke tempat yang berkenaan itu. Tanpa keterangan sedemikian, saya berpendapat 'sumber' di dalam kes ini masih boleh berlindung di bawah s 40 Akta dan kegagalan pihak pendakwa memanggilnya untuk memberi keterangan atau menyediakannya untuk disoal balas oleh pihak pembela tidak sekali-kali boleh menjejaskan kes pihak pendakwa. Peranan yang dimainkan oleh 'sumber' di dalam kes ini adalah jauh berbeza daripada peranan yang dimainkan oleh pemberi maklumat di dalam kes *Ti Chuee Hiang v PP* (di atas) [[1995] 2 MLJ 433]. Izinkan saya mengulangi bahawa setiap kes bergantung kepada fakta masing-masing. Dengan itu saya menolak hujah penguambela yang mendesak mahkamah untuk memakai s 114(g) Akta Keterangan [1950] terhadap pihak pendakwa. Sepertimana kata Mohamed Azmi HMA di dalam kes *Munusamy v Public Prosecutor* [1987] 1 MLJ 492 di ms 494: C D E F G H

> > 'In our opinion whether a person is an informer or has become an active agent provocateur would depend on the facts of each particular case. In the instant case the protection under s 40(1) clearly applies since the evidence showed that all the informer did was to accompany DPC Lian on the 14th and introduce him to the appellant. Accordingly there is no merit in the argument that the learned judge ought to have invoked the adverse presumption under s 114(g).' I

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> Dengan hormatnya, saya berpendapat bahawa kata-kata Mohamed Azmi HMA adalah terpakai di dalam keadaan kes ini. Di dalam alasan yang dinyatakan itu saya dengan hormatnya menolak penghujahan peguambela supaya mahkamah membuat anggapan bertentangan di bawah s 114(g) Akta Keterangan terhadap pendakwa.

B In the context of the present case, a matter of concern to us was whether the trial judge's treatment of the evidence of the appellant in the context of the role of Wong Lou Kat amounted to a legitimate treatment. The law requires a trial judge to consider all of the evidence that has been adduced in support of the defence. A court must consider carefully whether a defence put forward is capable of raising a reasonable doubt in the prosecution's case.

C As Mohamed Azmi SCJ stated in *Mohamad Radhi bin Yaakob v Public Prosecutor* [1991] 3 MLJ 169 at p 171:

> We are of the view that whenever a criminal case is decided on the basis of the truth of the prosecution's case as against the falsity of the defence story, a trial judge must in accordance with the principle laid down in *Mat v PP* [1963] MLJ 263 go one step further before convicting the accused by
D giving due consideration as to why the defence story, though could not be believed, did not raise a reasonable doubt in the prosecution case. Thus, even though a judge does not accept or believe the accused's explanation, the accused must not be convicted until the court is satisfied for sufficient reason that such explanation does not cast a reasonable doubt in the prosecution case.

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In a suitable case, it has been known that a court must consider a defence even if it has not been specifically raised. As Ashworth J stated in *R v Porrit* (1961) 45 Cr App Rep 348 (also at [1961] 3 All ER 463) at p 356:

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> As has already been said, the issue of manslaughter was not raised at the trial, but there is ample authority for the view that notwithstanding the fact that a particular issue is not raised by the defence, it is incumbent upon the judge trying the case, if the evidence justifies it, to leave that issue to the jury.

It is a salutary rule of law that the failure to consider a possible legal defence
G is a miscarriage of justice (see *Ong Ah Too v Regina* [1955] MLJ 247).

We are, on reflection, not in total agreement with the learned judge on this aspect, on his treatment of the defence, especially in respect of the role of Wong Lou Kat. Even though there is a paucity of evidence whether the said Wong Lou Kat was an agent provocateur, we felt in view of the role he
H played in both the prosecution's and defence's version, he should have been produced as a prosecution witness, or at the least offered to the defence. The undisputed facts remain that the said Wong Lou Kat was present at the time of the arrest, and equally there was communication between him and the appellant, prior to appellant's arrest. In fact he arranged the rendezvous with the appellant in order to accompany the appellant to return the hired
I car.

A distinct possibility that was not considered by the trial judge was the fact that there could have been a pre-arrangement between the appellant

and the said Wong Lou Kat about a pick-up, at the rendezvous, suggested by the said Wong Lou Kat. This is a plausible possibility which should have been borne out in the learned trial judge in his grounds of judgment. With regret, this was not done. If we were to accept this possibility as mentioned above, it somewhat throws a different complexion to the entire case. We thus find the lack of application of the learned judge of this possible legal defence, a miscarriage of justice.

We wish to emphasize here this is not the usual run of the mill case, when the police merely acted on a tip off, by an informer, who is invariably not present, but is a case when the informer was not only present at the time of the arrest, but was in dialogue with the appellant prior to the arrest, and had dealing with the appellant as regards the hiring of the car prior to the arrest of the appellant. We are of the concerted view that Wong Lou Kat was essential to the unfolding of the narrative of the prosecution's case and should have been called as a witness. The trial judge's rejection of the need to call him based on the fact that he was an informer, is in our view misplaced.

There was also another infirmity in the judgment worth mentioning, and that is the defence's version of events that it was not ASP Luthfi, but PC Yap who had arrested the appellant. The trial judge in this respect had this to say in his grounds of judgment when reflecting this version of the defence:

> Bagi memperkuatkan ceritanya, tertuduh juga menyatakan bahawa ASP Luthfi tidak ada langsung di tempat kejadian dan orang yang menangkapnya ialah seorang anggota polis yang dikenalinya sebagai Yap. Kalaulah benar ceritanya, kenapa perlu Asp Luthfi berbohong kepada mahkamah, *kerana tidak ada bezanya dari segi undang-undang siapa yang menangkap tertuduh, sama ada Yap atau ASP Luthfi.* Yap sebagai seorang anggota polis mempunyai cukup kuasa untuk menangkap tertuduh. Daripada itu saya tidak nampak kenapa ASP Luthfi perlu mengatakan dia yang menangkap tertuduh jika sebenarnya dia tidak berbuat demikian seperti yang dikatakan oleh tertuduh. Oleh hal yang demikian saya memutuskan bahawa keterangan tertuduh semestinya ditolak sama sekali dan keterangan ASP Luthfi diterima tanpa sebarang keraguan. (Emphasis added.)

We are of the view that it is an erroneous view to suggest, as the trial judge did, that it is immaterial as to who arrested the appellant — whether ASP Luthfi or PC Yap. With respect, thus, we feel it tantamounts to riding rough shod over the evidence. To us it would matter as to who effected the arrest, as it would have a bearing on the prosecution's narrative. The fact that PC Yap was not called as a witness by the prosecution in this instance, but merely offered to the defence, would, we hold, have a material effect on the case for the prosecution.

Having examined the evidence led by the prosecution afresh, we find that the evidence left too many questions unanswered, especially the role of the so called informer. In view of our reservation, especially on the treatment of the defence case in the context of the alleged informer, and the fact there may have been a material gap in the prosecution case, we allowed this appeal, and set aside the order of conviction.

A In our opinion, the justice of the case does not allow us to consider s 60 of the Courts of Judicature Act 1964 to sustain the conviction on the charge of trafficking.

Appeal allowed and conviction set aside.

B Reported by Andrew Christopher Simon

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